

No. 6960

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIS E. GOODMAN,

Appellant,

vs.

E. C. STREET, as Trustee in Bankruptcy
of the Estate of HENRY DUFFY PLAYERS
(a corporation), Bankrupt,

Appellee.

BRIEF FOR APPELLANT.

GEORGE M. NAUS,

Alexander Building, San Francisco,

GOODMAN, BACHRACH & BROWNSTONE,

Russ Building, San Francisco,

Attorneys for Appellant.

FILED

FEB 20 1933

PAUL P. O'BRIEN,

CLERK

Subject Index

	Page
I. Statement of the case.....	2
II. Specification of error.....	4
III. Argument	4

Table of Authorities Cited

	Page
In re Faerstein, 58 F. (2d) 942.....	5
In re Finkelstein, 3 F. (2d) 1006.....	6
In re Pearlman, 16 F. (2d) 20, 21, col. 2 (C. C. A. 2)....	6
In re Russell, 105 Fed. 501.....	6
In re Shelley, 8 F. (2d) 878.....	5
In re Walser, 20 F. (2d) 136.....	5
In re Wilkes Barre Yellow Cab Co., 53 F. (2d) 1024....	6

No. 6960

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIS E. GOODMAN,

Appellant,

vs.

E. C. STREET, as Trustee in Bankruptcy
of the Estate of HENRY DUFFY PLAYERS
(a corporation), Bankrupt,

Appellee.

BRIEF FOR APPELLANT.

May it please the Court:

This appeal is from an order of the District Court, made by way of *sua sponte* "review", disallowing and striking out a disbursement item of \$500.00 from the trustee's final account, which item had been disbursed by the trustee pursuant to an order of the referee that had become final.

The record includes the order, an agreed statement of the case under Equity Rule 77, a copy of the opinion of the District Court, and an assignment of errors.

The agreed statement of the case (Trans. 2-5) condenses the facts, and we therefore quote it in full as our statement under Rule 24:

I.

STATEMENT OF THE CASE.

The question presented by the appeal of Louis E. Goodman arose and was decided in the District Court as follows:

On June 6, 1930, Henry Duffy Players, a corporation, was adjudicated an involuntary bankrupt upon a petition filed in this [District] Court on May 17, 1930, and the administration of the estate of said bankrupt was referred generally to Honorable Thomas J. Sheridan, one of the standing referees in bankruptcy of this Court, and a receiver was appointed and qualified on May 17, 1930, and operated the business of the bankrupt until the appointment and qualification of the trustee on July 1, 1930. With the permission and approval of this Court, Louis E. Goodman was regularly appointed and rendered services as attorney for said receiver, in accordance with General Order XLIV, and Reuben G. Hunt was regularly appointed and rendered services as attorney for said trustee. In December, 1931, three matters came on for hearing and decision by said referee: (1) the trustee's second and final account; (2) an application by said Reuben G. Hunt for an allowance of \$5,140.50 to him as compensation for his services as attorney for said trustee; (3) an application by said Louis E. Goodman for an allowance of \$500.00 to him as compensation for his services as attorney for said receiver, which application and the hearing thereon fully complied in all respects with General Order XLII. All three matters, as aforesaid, were regularly heard, and on April 16, 1932, said referee decided

them and entered orders as follows: (1) said account was settled; (2) the said application of said Reuben G. Hunt was allowed in part and disallowed in part; (3) the said application of said Louis E. Goodman was allowed in full.

No petition for review under General Order XXVII, nor any petition for review at all, was ever filed, with respect to either the order settling the account, as aforesaid, or the order allowing the application of said Louis E. Goodman. Neither of those matters was contested before either said referee or this [District] Court. Rule 9 of the Bankruptcy Rules of this [District] Court is as follows:

“A petition for a review by the Judge of an order made by the Referee, as provided in General Order No. XXVII of the General Orders in Bankruptcy, must be filed with the Referee within ten days after the date of notice of such order. For good cause shown the Referee may at any time, within said period of ten days, grant a reasonable extension of time within which a petition for review may be filed, and grant further reasonable extensions within the period of the previous extension.”

No extension of time thereunder has ever been requested or granted, in connection with the orders mentioned in this statement of the case.

Said Reuben G. Hunt alone filed, under General Order XXVII, with said referee a petition for review of the order disallowing his application in part, and therein set out, as error complained of, solely and only the disallowance in part of the application of him,

said Reuben G. Hunt, and praying solely and only for a further allowance to him, and said referee thereupon made his certificate under General Order XXVII. After hearing said review, this Court made the following order on August 12, 1932:

“It is ordered that the account as allowed by the referee be and the same is approved with the exception of the item of \$500 allowed to the attorney for the receiver which is stricken from the account.”

II.

SPECIFICATION OF ERROR.

The District Court acted without jurisdiction in reviewing the referee's allowance of \$500.00 to Louis E. Goodman, in the absence of a petition for review under General Order 27.

III.

ARGUMENT.

The District Court is without jurisdiction to review an order made by the referee, in the absence of a petition for review under General Order 27.

The administration of the estate was referred generally under Section 22 (11 U. S. C. § 45) to one of the standing referees of the Court, and in due course of administration the referee made an order allowing \$500.00 to Louis E. Goodman as compensation for his services as attorney for the receiver. No petition for review of that order, under General Order 27 or at all, was ever filed. The District Court “reviewed” it

sua sponte in the course of review of a *different* order that happened to be brought before it, one that did not concern Louis E. Goodman. In fact, Louis E. Goodman was not before the Court, and had neither notice nor hearing of the contemplated *sua sponte* action.

General Order No. 27 reads as follows:

“REVIEW BY JUDGE. When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.”

Less than a year ago, this Court said:

“That the procedure of review is plainly defined and *power limited* in the interest of regularity and for the common good is clearly stated by Judge Sawtelle of this court, sitting as District Judge, in *Re Octave Mining Co.* (D. C.), 212 F. 457, 458, as follows: ‘It is manifest that the mode prescribed by General Order 27 is the only manner in which the decisions of the referee may be reviewed. * * *’” [Italics added.]

In re Faerstein, 58 F. (2d) 942.

And to that proposition that *the mode prescribed is the measure of power* to review, the Court additionally cited:

In re Shelley, 8 F. (2d) 878;

In re Walser, 20 F. (2d) 136.

We here cite further decisions to the proposition:

In re Russell, 105 Fed. 501;

In re Finkelstein, 3 F. (2d) 1006;

In re Wilkes Barre Yellow Cab Co., 53 F. (2d) 1024.

“The proceeding is in substance an appeal from the court of bankruptcy—i. e., the referee—to the District Court.”

In re Pearlman, 16 F. (2d) 20, 21, col. 2 (C. C. A. 2).

The rule is sound and tends to better administration of estates. Hundreds of disbursements are ordered by referees in busy districts, and the rule enables trustees safely and promptly to make disbursements as soon as an order has become final through the passage of the time in which a petition for review may be filed. Moreover, what need is there to imperil a trustee who has simply obeyed an order of which neither the bankrupt, creditor, nor other person has complained nor desires to complain?

A perusal of the memorandum opinion of the District Court (Trans. 5-6) discloses an oversight of the rule. Furthermore, the two cases cited in that opinion bear solely on the question of the receiver's divestiture of power to act as representative of the estate after a trustee has been appointed. Granting that proposition, nevertheless the receiver is not automatically removed, but must prepare and present his final account, and have it settled, before he can obtain his discharge. In the case at bar, the receiver

took custody of going theatres at San Francisco, Oakland, Los Angeles and Portland, and operated them, financing the operation through the issue of certificates; and the operating deficit resulted in controversies in the settlement of his account. Louis E. Goodman was regularly appointed as his attorney under General Order 44, and in the verified petition for compensation said *inter alia*:

“Your petitioner [Louis E. Goodman] also attended hearings in connection with the settlement of the receiver’s first account herein and in connection with the determination of the respective rights of creditors of the receivership, prepared the report of the Special Master herein, and argued the said matter before Honorable Frank H. Kerrigan, United States Judge and filed briefs herein. Your petitioner devoted at least six full days time in connection with the matters just referred to.”

That service alone was worth the \$500.00 allowed by the referee; in any event, the District Court (assuming *arguendo* that a “review” of the allowance was regularly before it) erred in ruling, in substance, that the referee was without jurisdiction to allow compensation to the receiver’s attorney. The referee had jurisdiction to award some amount, and if he erred in fixing the amount through commingling authorized and unauthorized services, that is but error in the exercise of jurisdiction; the referee’s order would be merely voidable under a petition to review; not wholly void and thereby open either to collateral attack or to *sua sponte* vacation by the District Court.

As the District Court was without jurisdiction to make the order appealed from, the order should be reversed.

Dated, San Francisco,
February 20, 1933.

Respectfully submitted,
GEORGE M. NAUS,
GOODMAN, BACHRACH & BROWNSTONE,
Attorneys for Appellant.